burden to place on receiver owners. The chimerical nature of the concept of "Cellular privacy" means that this proposal, too, lacks a rational basis.

41. Moreover, making scanning receivers throwaway devices poses significant environmental and human risks. Most scanning receivers employ batteries as their main power source, and to "keep alive" memory circuits in which basic operating parameters and users' favorite frequencies are stored. If scanning receivers become throwaway items, in many (if not most) cases the batteries inside them will also enter the solid-waste stream. As the Environmental Protection Agency puts it:

> ***Discarding batteries poses a clear environmental danger. Batteries contain heavy metals, such as silver, nickel, cadmium, lead, mercury, lithium, manganese, and zinc, which can accumulate and concentrate in waterlife, wildlife, and humans. An example of the danger posed by batteries is that one mercury battery contained in six tons of garbage exceeds the allowable limit for mercury in solid waste as established by the federal government.***

[Emphasis added.] *http://www.epa.gov/grtlakes/seahome/housewaste/house/battdr.htm.*

A discarded battery poses other threats beyond the risk due to the leaching of toxic chemicals. The same source also recognizes that batteries often explode when incinerated along with other solid waste, and that contact with the liberated contents of batteries can cause burns and irritation. Therefore, the proposed rule poses significant environmental risks.

42. Subchapter I of the National Environmental Policy Act of 1969, as amended, 52 U.S.C. § 4321 et seq. (*NEPA*), requires the Commission to consider the potential environmental consequences of its actions. Part 1, Subpart I of the FCC's own rules, which implement NEPA, also require the Commission to undertake certain analyses with respect "...to all Commission

actions that may have a significant impact on the quality of the human environment." 47 C.F.R. §§ 1.1301, 1.1303, 1.1305. Despite the proposed § 15.121(a)(2)'s clear environmental threats, the NPRM does not even mention NEPA, the Commission's own procedural requirements under the NEPA mandate, or even the risks themselves. The Commission cannot sidestep its responsibilities in this regard. To do so would fatally taint any rule so promulgated. "[I]t is elementary that an agency must adhere to its own rules and regulations." Reuters Limited v. FCC, 781 F. 2d 946, 950 (D.C. Cir. 1986).

43. Current § 15.121, assuming *arguendo* its (and its goal's) validity, is more than adequate. The NPRM states that the current rules "have not been fully effective." NPRM at para. 4. Yaesu respectfully submits that complete success is an unattainable goal.[18] And as Yaesu has already demonstrated, perhaps sad but nonetheless true, *there is no privacy of analog Cellular communications, there never has been, and there never will be.*

C. Implementation Period

44. Assuming, in the worst case, that the FCC goes ahead and adopts the technical rules discussed above as proposed, the 90-day implementation period that the NPRM proposes is draconian in its brevity. As Yaesu has discussed in paras. 35-36 and 39 above, compliance

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[18]See, e.g., para. 20, above:

> "And although Congress also passed a law banning the manufacture of scanners capable of eavesdropping on cellular calls,these devices are still available outside the United States. 'You can buy one at a RadioShack in England or Canada," says Murray, "and they can FedEx it to you the next day.'"

with the proposed regulations would require wholesale revamping of product designs and manufacturing processes. Yaesu and others have made substantial investments of time, engineering talent, and production machinery in good faith to produce products that comply with the Commission's rules. Much of that would be thrown out the window if the FCC requires compliance with the proposed standards. And to require compliance within 90-days is like asking a supertanker to execute a 180-degree turn on a dime.

45. Moreover, the proposed 90-day transition period lacks a foundation of substantial evidence. The NPRM states the FCC's believe that the current "... rules generally have been successful in preventing the manufacture and import of scanning receivers that can tune Cellular Service frequencies directly." When the Commission adopted those rules, at the specific direction of Congress, it provided a ***one-year*** transition period. In doing so, the FCC characterized that period as admittedly "short." Reconsideration Order, 75 Rad. Reg. (P & F) 2d at 983, para. 6. However, the Commission stated that it had no choice, because it was following an explicit Congressional mandate. Id.

46. Here, there is no Congressional mandate. Since the current rules "...generally have been successful, there is no need for a shorter transition period in 1998 than the one set in place in 1993-1994. Indeed, a transition period of 12 months is the absolute minimum conscionable, and is well supported by FCC precedent. For example, when the Commission, out of concerns about interference to public-safety and other communications, imposed specific emissions limitations on Class B computing devices, it provided for a fifteen-month transition period. First Report and Order in Gen. Docket 20780, 79 FCC 2d 28 (1979). Existing Class A computing

devices were allotted *more than four years*. Id. When the Commission changed technical requirements for cordless phones, due to, among other things, concerns about inter-phone interference, it gave manufacturers anywhere from ten months to almost three years to bring their products into compliance. Report and Order in Gen. Docket 83-325, 49 Fed. Reg. 1512 (1984). The FCC must treat similarly situated parties similarly, or provide a rational explanation for any disparate treatment. Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965). There is no rational basis for such a disparate result here.[19]

47. Also, on March 10, 1997, Uniden, in its Comments supporting its original Petition for Rule Making, stated that it had begun building scanning receivers with "special filters which were designed to enhance the image rejection characteristics of the radio receiver." Uniden Comments at 2. Uniden was under no obligation to do so, and as noted above, the enhanced image rejection that Uniden claims will add nothing to an already nonexistent Cellular privacy. Adopting Uniden's proposal with a 90-day cut- off will do nothing more than give Uniden a monopoly on the scanning-receiver market, to the severe detriment of Yaesu, of other manufacturers, and of consumers as well, for no rational, legitimate reason, until such time as Yaesu and other manufacturers can play catch-up. That is both unjustified and impermissible on Equal-Protection grounds.

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[19]Moreover, also assuming in the worst case that the FCC adopts the technical rules the NPRM proposes, the Commission should grandfather all currently certificated devices. The current FCC rules, as the NPRM observes at para. 4, "... generally have been successful...." The FCC has thus fulfilled Congress's directive (assuming *arguendo* its Constitutionality) to adopt "effective regulations" in this area. TDDRA at § 403.

IV. OTHER MATTERS

48. The other proposed changes the NPRM advances, however sincere the motivation may be, are also not supported by substantial evidence.[20] The goal of ensuring Cellular privacy is and always has been unattainable. Therefore, there is no legal basis for their adoption.

49. Yaesu manufactures products for the world market, and has taken extra, substantial steps to accommodate what, for this paragraph only, we will presume are valid FCC and Congressional concerns. This is much the same approach that American automobile manufacturers takes when they design one basic car chassis and one basic powerplant and drive train for the domestic market. Certain jurisdictions such as California have more demanding emissions constraints because of population and vehicle density. The manufacturers design a California variant of the basic car to meet Californian concerns. California does not insist on a wholly new design from the ground up, or the entombing of vehicular engines and fuel-injection systems in epoxy, simply because someone, skilled in automobile mechanics and desiring quicker pickup or better fuel economy, might defeat the extra California emissions-control components.

50. The global economy is by necessity becoming ever more integrated, and parties such as the United States and Japan have agreed, through such mechanisms as the World Trade Organization and the General Agreement on Tariffs and Trade, to lower trade barriers. A particular target of such efforts at integration have been the targeting of ostensible technical regulations that are really trade barriers in disguise. There would be grave doubt as to the validity, under these free-trade mechanisms, of FCC provisions that would force Yaesu to

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[20]They are also are Constitutionally infirm, for the reasons previously stated.

redesign essentially from scratch already-approved and compliant units, in the name of enhancing a Cellular privacy that exists only in the imagination.

V. CONCLUSION

51. For all the above reasons, the Commission should terminate this proceeding without adopting the proposed rules set forth in the Notice of Proposed Rule Making.

Respectfully submitted,

YAESU MUSEN CO., LTD.

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CERTIFICATE OF SERVICE

I hereby certify that I have, this Tenth day of July, 1998, sent a copy of the foregoing **COMMENTS**, by first-class United States mail, postage prepaid, to:

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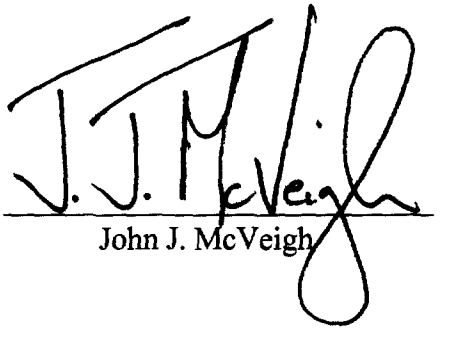

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